STATE OF MICHIGAN

COURT OF APPEALS

THOMAS MULLANEY and LYNN MULLANEY,

Plaintiffs-Appellees,

v

OLE C. KISTLER, D.O., KISTLER CLINIC, P.C., PHILIP HOLMES, D.P.M., VICKI ANTON-ATHENS, D.P.M., P.C., STEVEN J. SERRA, D.O., STEVEN J. SERRA, D.O., P.C., HENRY FORD HEALTH SYSTEM, HENRY FORD HEALTH SYSTEM HOME HEALTH CARE, DIANE SMALLEY, IVONYX, INC., COMPLETE INFUSION CARE, INC., and HORIZON HOME CARE, d/b/a FOCUS HEALTH CARE,

Defendants,

and

LABORATORY CORPORATION OF AMERICA and HEALTH ALLIANCE PLAN OF MICHIGAN,

Defendants-Appellants.

UNPUBLISHED
March 15, 2005

No. 239806
Wayne Circuit Court
LC No. 01-105655-NH

ON REMAND

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Our prior opinion in this medical malpractice action affirmed the circuit court's denial of motions for summary disposition filed by defendants-appellants Laboratory Corporation of America (LabCorp) and Health Alliance Plan (HAP), which had sought dismissal of plaintiffs' complaint on the bases that (1) the affidavit of merit that accompanied the complaint failed to comply with the requirements set forth in MCL 600.2912d, and (2) plaintiffs' proffered expert, board-certified pharmacist Dr. Gerald McGrory, did not qualify as competent under MCL 600.2169. In lieu of granting LabCorp's and HAP's applications for leave to appeal, the Supreme Court vacated our prior decision and remanded this case for reconsideration in light of

Roberts v Mecosta Co Gen Hosp (After Remand), 470 Mich 679; 684 NW2d 711 (2004). *Mullaney v Kistler*, 471 Mich 932 (2004). We now reverse.

In *Roberts*, the Supreme Court considered whether the notices filed by the plaintiff asserting her intent to commence medical malpractice actions against various defendants satisfied the requirements of MCL 600.2912b. *Roberts*, *supra* at 681-682. The Supreme Court observed that

> [t]he unambiguous language of MCL 600.2912b(4) requires a medical malpractice plaintiff to include in her notice of intent a statement of (1) the factual basis for the claim, (2) the applicable standard of practice or care alleged by the claimant, (3) the manner in which it is claimed that the applicable standard of practice or care was breached, (4) the alleged action that should have been taken to comply with the alleged standard, (5) the proximate cause of the injury claimed in the notice, and (6) the names of all professionals and facilities the claimant is notifying. [*Roberts, supra* at 682.]

The Supreme Court emphasized that under subsection 2912b(4), a plaintiff's notice must supply separate statements containing "good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings," and that "[t]he information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them." *Roberts*, *supra* at 691-701 (emphasis in original).

The Supreme Court found that while the plaintiff's notices of intent were not "wholly deficient" in complying with the statutory requirements, they nonetheless did not achieve

> . . . full compliance with § 2912b because they fail to properly set forth allegations regarding the standard of practice or care applicable to each named defendant, allegations regarding the manner in which it was claimed that defendants breached the applicable standards of practice or care, the alleged actions that defendants should have taken in order to satisfy the alleged standards, or allegations of the manner in which defendants' breaches of the standards constituted the proximate cause of plaintiff's injury. [*Roberts, supra* at 682.]

Given that the plaintiff's notices failed in several respects to satisfy the requirements of subsection 2912b(4), the *Roberts* Court reversed this Court and reinstated the trial court's grant of summary disposition to the defendants on the basis that "the statute of limitations was not tolled during the notice period." *Roberts*, *supra* at 701-702.

The affidavit of merit provisions at issue in this case, in MCL 600.2912d(1), are not in all respects identical to the notice requirements contained within MCL 600.2912b(4). But both subsections 2912b(4) and 2912d(1) identically provide that the notice and affidavit "shall contain a statement of" various elements relating to the defendant's alleged negligence. In a manner substantially similar to the enumerated requirements within subsection 2912b(4), subsection 2912d(1) obligates the plaintiff's expert to set forth in the affidavit of merit (a) "[t]he applicable standard of practice or care," (b) the expert's "opinion that the applicable standard of practice or care was breached by" the defendant, (c) "[t]he actions that should have been taken or omitted by

the . . . [defendant] in order to have complied with the applicable standard of practice or care," and (d) "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged."

In light of (1) the substantial similarity between the statutory requirements within subsections 2912b(4)(b)-(e) and 2912d(1)(a)-(d), (2) the Supreme Court's construction of subsection 2912b(4)(b)-(e) as mandating particularized statements of "details that are *responsive* to the information sought by the statute," *Roberts*, *supra* at 701 (emphasis in original), and (3) our finding in our prior opinion that the affidavit of McGrory filed by plaintiffs in this case "lacked a detailed statement of the actions that LabCorp and HAP should have taken to comply with the standard of care, and lacked a statement of the manner in which the breach proximately caused plaintiff Thomas Mullaney's injuries," we conclude that McGrory's affidavit does not satisfy the requirements of MCL 600.2912d(1)(c) and (d). Because plaintiffs failed to submit with their complaint an affidavit of merit that satisfies MCL 600.2912d(1), the filing of the complaint and defective affidavit did not toll the period of limitation, which expired on March 4 or 5, 2001. *Geralds v Munson Healthcare*, 259 Mich App 225, 236-240; 673 NW2d 792 (2003); *Mouradian v Goldberg*, 256 Mich App 566, 573-575; 664 NW2d 805 (2003). Consequently, plaintiffs' action is time-barred.[1]

We reverse and remand for entry of an order granting Lab Corp and HAP summary disposition. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper

[1] In light of our conclusion that the period of limitation has expired because the affidavit of McGrory that plaintiffs filed with their complaint did not satisfy the requirements of MCL 600.2912d(1), we need not reach the remaining moot question whether plaintiffs' counsel reasonably believed that McGrory qualified as an appropriate expert under MCL 600.2912d(1) and MCL 600.2169.